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SRB updates approach to prior permissions regime

The Single Resolution Board (SRB) has amended its provisional policy on its approach to the prior permissions regime for calling, redeeming, repaying or repurchasing of eligible liabilities instruments ahead of their maturity.

In particular, the SRB has updated its approach to permission applications in light of the regulatory technical standards (RTS) under Regulation (EU) 2019/876 (CRR2) specifying certain elements of authorisation not entering in force on 1 January 2022 due to procedural reasons.

To limit the need for banks to re-submit a second authorisation application for General Prior Permissions (GPP) once the RTS enter into force, the SRB has amended its provisional policy in line with the draft RTS and published a list of information requirements for all applications for authorisations from 1 January 2022.

The SRB notes that the draft RTS includes some material changes, in particular regarding the authorised envelope for redemptions (the 'pre-determined amount') and the need to deduct it upfront from banks' minimum requirement for own funds and eligible liabilities (MREL) resources.

The SRB intends to publish an additional communication on the new regime in early September.

Coronavirus: ECB will not extend its recommendation that banks limit dividends and share buy-backs

The European Central Bank (ECB) has announced that it will not extend its recommendation that all banks limit dividends and share buy-backs beyond the intended deadline of 30 September 2021.

The recommendation, which was issued in December 2020, called on banks to limit dividend payments and share buy-backs to below 15% of cumulated 2019-20 profits and 20 basis points of CET1 ratio, in order to improve their capacity to absorb losses and support lending during the COVID-19 pandemic.

In light of the latest macroeconomic projections, the ECB has decided to return to the previous supervisory practice of discussing capital trajectories and dividend or share buy-back plans with each bank in the context of the normal supervisory cycle. Its recommendation will remain applicable until 30 September 2021, after which it will expire. The next decisions regarding the payment of dividends should therefore take place in the fourth quarter of 2021.

The ECB calls on banks to remain prudent when deciding on dividends, share buy-backs and other remuneration policies, to ensure their business model remains sustainable and takes appropriate care of the potential impact that additional losses may have as COVID-19-related support measures begin to expire.

Cross-border payments regulation published in Official Journal

Regulation (EU) 2021/1230 on cross-border payments in the EU has been published in the Official Journal.

The regulation, which codifies the existing texts in this area without any change in their substance, will enter into force on 19 August 2021.

MiFID2/MiFIR: ESMA publishes annual review report under RTS2

The European Securities and Markets Authority (ESMA) has published the Markets in Financial Instruments Directive (MiFID2)/Markets in Financial Instruments Regulation (MiFIR) annual review report under Commission Delegated Regulation (EU) 2017/583 (RTS 2).

In the report, ESMA has prepared a draft delegated regulation amending RTS 2 to move to stage three of the phase-in for the transparency requirements with regard to:

- the average daily number of trades (ADNT) threshold used for the quarterly liquidity assessment of bonds; and
- the trade percentile used to determine the pre-trade size specific to the financial instrument (SSTI) threshold for bonds.

As the level of completeness and quality of data was considered insufficient to perform the annual transparency calculations for non-equity instruments other than bonds, ESMA considers it premature to move to stage two for the pre-trade SSTI threshold for these instruments.

The report has been submitted to the EU Commission for endorsement, and the amended RTS are expected to be adopted and published in the Official Journal.

CRD: EBA publishes guidelines on intermediate EU parent undertaking requirement for third-country groups

The European Banking Authority (EBA) has published final guidelines on the monitoring of the threshold and other procedural aspects on the establishment of intermediate EU parent undertakings (IPU) as laid down under the Capital Requirements Directive (CRD).

The guidelines relate to the requirement for institutions belonging to a third-country group with a total value of assets in the EU equal to or greater than EUR 40 billion to have an IPU established in the EU, and seek to clarify the relevant dates for institutions' calculation of the total value of the assets, including:

- calculating the total value as an average over the last four quarters;
- carrying out quarterly assessments of that value and communicating the outcomes to relevant competent authorities; and
- assessing at least annually whether the threshold is expected to be breached within the three-year horizon.

The guidelines also specify certain procedural aspects relating to the IPU requirement, including exchange of information between the institutions, third-country branches and competent authorities, and notifications to be provided to the EBA on an annual basis, as well as monitoring of the threshold by competent authorities and the appropriate timelines for the establishment of an IPU.

CRR: EBA consults on RTS on identification of shadow banking entities

The EBA has launched a consultation on draft RTS setting out criteria for the identification of shadow banking entities for the purposes of reporting large exposures under the Capital Requirements Regulation (CRR).

The RTS identify shadow banking entities as entities that offer banking services and perform banking activities as defined in the RTS, but that are not regulated and are not being supervised in accordance with any of the acts that form the regulated framework.

The RTS include special provisions that consider the characteristics of funds regulated under the Undertakings for the Collective Investment in Transferable Securities (UCITS) Directive and the Alternative Investment Fund Managers (AIFM) Directive. Money market funds (MMFS) are also identified as shadow banking entities in view of the liquidity issues they faced during the COVID-19 crisis and the ongoing discussions to strengthen their regulation. Additionally, the RTS consider the situation of entities established in third countries and provide for a treatment that distinguishes between banks and other entities.

Comments are due by 26 October 2021. A public hearing will take place via conference call on 29 September 2021.

Working Group on Euro Risk-Free Rates publishes recommendations on switch to risk free rates in interdealer market

The Working Group on Euro Risk-Free Rates has published its recommendations on a common start date for the switch to risk-free rates (RFRs) for trading and quoting conventions in the interdealer market.

The Working Group recommends as market best practice that interdealer brokers change risk-free rate swap trading conventions from EONIA to €STR from 18 October 2021, in line with the CCP transition from EONIA to €STR. This only relates to the trading of RFR based swaps and does not apply to EURIBOR based swap trading.

The Working Group also supports the recommendation of a common start date of 21 September 2021 for a switch of quoting conventions in the interdealer market for USD, GBP, CHF and JPY legs of cross-currency swaps, and encourages euro area market participants to adopt this market practice subject to supportive market conditions at the time. For cross-currency swaps with a EUR denominated leg, the Working Group intends to continue monitoring the development of market liquidity and the demand from end users.

Green Finance: IOSCO consults on ESG ratings and data providers

The International Organization of Securities Commissions (IOSCO) has launched a consultation proposing a set of recommendations to mitigate the risks and address challenges faced by users of products and services from environmental, social and governance (ESG) ratings and data providers, and the companies that are the subject of these ESG ratings and data products.

The consultation sets out ten key recommendations for ESG ratings and data products providers to consider:

- issuing high quality ESG ratings and data products using transparent and defined methodologies;
- ensuring their decisions are independent from political or economic pressures arising due to organisational structure, business or financial activities;
- avoiding activities that compromise the objectivity of the ESG rating and ESG data products provider's operations;
- making high levels of public disclosure and transparency an objective in their ESG ratings and data products;

- maintaining in confidence all non-public information communicated to them by companies in relation to their ESG ratings and data products;
- conducting due diligence on the ESG ratings and data products;
- improving information gathering processes with entities covered by their products;
- focusing more attention on the use of ESG ratings and data products in their jurisdictions;
- streamlining their disclosure processes for sustainability related information; and
- responding to and addressing issues flagged by entities covered by their ESG ratings and data products.

Comments are due by 6 September 2021.

FCA publishes second policy statement on Investment Firms Prudential Regime

The Financial Conduct Authority (FCA) has published its second policy statement (PS21/9) on the introduction of the Investment Firms Prudential Regime (IFPR) for investment firms authorised under the UK MiFID.

The policy statement applies to UK MiFID firms subject to the UK CRD and UK CRR, as well as holding companies of groups containing firms authorised under UK MiFID and/or a collective portfolio management investment (CPMI), and covers:

- own funds requirements;
- treatment of firms acting as clearing members and indirect clearing firms;
- the basic liquid assets requirement;
- risk management, the internal capital adequacy and risk assessment (ICARA) process and the supervisory review and evaluation process (SREP);
- the remuneration code (MIFIDPRU), including scope and application, and basic, standard and extended requirements;
- governance;
- regulatory reporting;
- the interaction of MIFIDPRU with other prudential sourcebooks; and
- MiFIDPRU application and notification forms.

The policy statement is accompanied by near final rules that will be made final once the relevant statutory instruments are made under the Financial Services Act 2021.

The FCA intends to publish a further consultation paper and a further policy statement bringing together all final rules in Q4 2021 and expects the IFPR to take effect in January 2022.

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FCA publishes final rules to strengthen investor protections in SPACs

The FCA has published its final rules and changes to its Listing Rules for certain special purpose acquisition companies (SPACs).

In response to feedback on the its consultation on proposals to remove the presumption of suspension for SPACs meeting certain criteria, the FCA has made changes which:

- lower the minimum amount a SPAC would need to raise at initial listing from GBP 200 million to GBP 100 million;
- introduce an option to extend the proposed two-year time-limited operating period by six months without the need for shareholder approval in limited circumstances; and
- modify its supervisory approach to provide more comfort prior to admission to listing that an issuer is within the guidance with disapplies the presumption of suspension.

The final rules aim to provide more flexibility to larger SPACs, provided they embed certain features that promote investor protection and the smooth operation of UK markets. Private companies listing in the UK via a SPAC will still be subject to the FCA's full listing rules and transparency and disclosure obligations.

The new rules and guidance will come into force on 10 August 2021.

FCA consults on changes to decision-making process

The FCA has launched a consultation on proposed changes to its decision-making process. It is proposing to move some decision-making responsibilities from its Regulatory Decisions Committee (RDC), which is part of the FCA Board, to senior members of FCA staff in its authorisations, supervision and enforcement divisions. The change is intended to give greater responsibility for decisions to staff close to the matters being decided upon.

In particular, the FCA is proposing that the following decisions should be made by staff rather than the RDC:

- imposing a requirement on a firm or varying its permissions by limiting or removing certain types of business;
- making a final decision in relation to a firm's application for authorisation or an individual's approval that has been challenged;
- making a final decision to cancel a firm's permissions because it does not meet the FCA's regulatory requirements; and
- the decision to start civil and/or criminal proceedings.

The RDC will continue to make decisions in relation to enforcement cases where the FCA is proposing a disciplinary sanction or seeking to impose a prohibition order.

Comments on the proposals are due by 17 September 2021.

FCA consults on disclosure of diversity of listed company executives

The FCA has launched a consultation on proposals to improve transparency for investors on the diversity of listed company boards and their executive management teams.

The FCA is proposing changes to its Listing Rules that would require listed companies to publish an annual 'comply or explain statement' on whether they have achieved certain proposed targets for gender and ethnic minority representation on their boards, as well as data on the gender and ethnic make-up of their board and most senior level of executive management.

The FCA is also proposing changes to its disclosure and transparency rules to require companies to ensure any existing disclosure on diversity policies addresses key board committees and considers broader aspects of diversity, such as sexual orientation and disability.

The Listing Rules diversity targets are not mandatory, therefore the FCA is setting a positive benchmark for issuers to report against, rather than setting quotas. The proposals would apply to UK and overseas companies with equity shares in either the premium or standard listing segments of the FCA's Official List, while the disclosure and transparency changes apply to companies with securities traded on UK regulated markets.

Comments on the proposals are due 22 October 2021.

PRA publishes approach to supervision of international firms' subsidiaries and branches

The Prudential Regulation Authority (PRA) has published a policy statement (PS19/21) on its approach to supervising the UK activities of PRA-authorised banks and designated investment firms that are headquartered outside of the UK or are part of a group based outside of the UK.

PS19/21 includes the PRA's final supervisory statement on its approach to branch and subsidiary supervision (SS5/21), which sets out the PRA's overall approach and the relationship between:

- a firm's size and systemic importance;
- the information, co-operation, and controls likely to be required to be effectively supervised; and
- the degree of independence between UK and overseas business.

SS5/21 also sets out the specific factors considered by the PRA when deciding whether to authorise firms to undertake activities in the UK as a branch or a subsidiary.

SS5/21 replaces SS1/18 on the PRA's approach to branch authorisation and supervision, and took effect on 26 July 2021.

Firms operating under the temporary permissions regime (TPR) are expected to meet the expectations as soon as practicable, and in any event, by the time they are authorised by the PRA and exit the TPR.

PRA publishes banking supervisory disclosures

The PRA has published banking supervisory disclosures to enable a comparison of the approaches adopted by competent authorities in EU Member States.

Following the UK's withdrawal from the EU, the PRA has agreed, on a voluntary basis, to provide the following information required under the EU CRD4 for the period to end-2020:

- rules and guidance;
- options and discretions;
- SREP; and
- aggregated statistical data as at 31 December 2020.

The disclosure is designed to foster a uniform level of transparency and accountability between supervisory authorities, and will be of primary interest to PRA-authorised banks, building societies, investment firms and credit unions.

NPLs: PRA requests resubmission of consultation responses on capital treatment for non-performing exposure securitisations

The PRA has published an update to its consultation paper (CP10/21) on the implementation of Basel standards in respect of non-performing loan (NPL) securitisations requesting that responses received before 29 July 2021 be re-sent to SecuritisationPolicy@bankofengland.co.uk and announcing that the deadline has been extended to 9 August 2021. The update is in light of a technical issue.

CP10/21 sets out how the PRA proposes to define non-performing exposure (NPE) securitisations and amend the associated capital treatment. The proposals are intended to implement an amendment to the securitisation capital framework published by the Basel Committee on Banking Supervision (BCBS) in 2020.

PSR consults on lowering risks to delivery of New Payments Architecture

The Payment Systems Regulator (PSR) have launched a consultation on lowering risks to the delivery of the New Payments Architecture (NPA).

Following its consultation in February 2021, most respondents agreed with the PSR that Pay.UK should phase the development of the NPA by narrowing the scope of the NPA central infrastructure services (CIS) contract and secure this contract through a competitive tender.

In order to narrow the scope of the CIS contract, the PSR will mandate that Pay.UK:

- must, as a minimum, buy services needed to support single-push payments (which will allow most Faster Payments transactions to migrate to the NPA); and
- may buy additional services and system functionality only if the PSR does not object (which will include taking account of the adequacy of Pay.UK's consultation with industry on its proposals).

The PSR believes that its decision promotes competition and innovation, as it simplifies the NPA programme, therefore helping lower the risks to its delivery and makes it easier for Pay.UK to secure a contract that provides value for money and realises NPA benefits sooner.

The PSR is proposing to vary Specific Directions 2 and 3, which require Pay.UK to run a competitive procurement for the CIS contract. Comments are due by 10 September 2021.

BaFin consults on guidance note on external bail-in implementation at non-exchanges

The German Federal Financial Services Supervisory Authority (BaFin) has launched a consultation on a draft guidance note on external bail-in implementation at non-exchanges in the context of resolution (MeHNB). It supplements the existing guidance note on external bail-in implementation, which relates amongst other things to the suspension or halt of trading at exchanges, against the background of the German Risk Reduction Act (Risikoreduzierungsgesetz), which came into force on 28 December 2020 and extended BaFin's authority to suspend or halt trading to all trading venues and systematic internalisers.

The draft guidance note deals with the suspension or halt of trading by systematic internalisers within the meaning of Article 4 para 1 no 20 of Directive 2014/65/EU as well as multilateral and organised trading facilities (MTFs and OTFs) within the meaning of Article 4 para 1 no 22 and 23 of Directive 2014/65/EU which are not operated by an exchange within the meaning of section 2 of the German Stock Exchange Act (Börsengesetz). In addition, the draft guidance note describes the information beyond the resolution order to be provided by the resolution authority for this purpose and the requirements regarding implementation.

Comments on the draft guidance note may be submitted to BaFin until 25 August 2021.

BaFin publishes MREL circular

BaFin has published its revised circular on the determination of the MREL for institutions and group entities whose resolution plan provides for a winding up under normal insolvency proceedings.

The new circular amends and replaces the existing MREL circular of 20 August 2019 (Circular 12/2019 on the determination of MREL for institutions in respect of which the liquidation under normal insolvency proceedings as resolution strategy is credible and feasible). The amendments have been made to reflect the implementation of the Risk Reduction Act (Risikoreduzierungsgesetz) which came into force on 28 December 2019 to transpose BRRD2 and includes new rules for the calculation of MREL.

The MREL circular applies to institutions for which BaFin is competent resolution authority.

CSSF announces end of COVID-19 reporting relating to investment fund managers

The Luxembourg financial sector supervisory authority (CSSF) has published a communiqué to inform investment fund managers (IFMs) of the end of the following online COVID-19 reporting on 30 July 2021:

- the ad hoc 'IFM Notification on Fund Issues and Large Redemptions', which was initiated by the CSSF via eDesk in March 2020 and further extended in May 2020 in the context of the CSSF's specific monitoring of the largest IFMs with a view to collecting data on:
- significant developments/issues affecting Luxembourg and/or non-Luxembourg regulated and/or non-regulated funds (as applicable) managed by the relevant Luxembourg or non-Luxembourg based IFMs as a result of the current period of market turbulence (e.g. liquidity issues on the asset side, significant valuation challenges, etc.); and/or
- larger redemptions at the level of Luxembourg regulated UCITS, Part II UCIs and SIFs managed by the concerned IFMs (i.e. daily net redemptions exceeding 5% of the NAV, net redemptions over a calendar week exceeding 15% of the NAV and/or application of gates/ deferred redemptions); and
- the 'Weekly IFM Questionnaire', which was launched by the CSSF via eDesk in April 2020 in order to receive weekly updates on financial data (total net assets, subscriptions and redemptions) and governance arrangements in relation to the activities performed by certain IFMs (including e.g. Luxembourg/EU UCITS management companies, Luxembourg/EU authorised AIFMs as well as non-EU AIFMs provided that they manage at least one UCITS, one regulated or non-regulated AIF or any other fund not qualifying as AIF) in view of the specific circumstances and risks which they were exposed to during the COVID-19 pandemic.

The reporting was initiated to allow the CSSF to continue ongoing supervision of the investment fund sector during the COVID-19 pandemic and to serve as a basis for discussions at EU and international level with other authorities and market players. In view of the evolution of the investment funds/IFMs sector and financial markets, the CSSF has decided to end this ad hoc reporting at the end of July 2021. The relevant IFMs have to provide the last reporting for the reference date of 30 July 2021 as regards the 'IFM Notification on Fund Issues and Large Redemptions', and for the reference week from 26 July to 30 July 2021 as regards the 'Weekly IFM Questionnaire'.

In its communiqué, the CSSF also indicates that the reporting 'Early Warning on Large Redemptions', which is only applicable to a limited number of UCITS was reinstated with effect from 2 August 2021. The CSSF will contact the concerned IFMs separately with more specific instructions.

CSSF updates notification procedures in respect of marketing of UCITS in accordance with Cross-Border Distribution of Funds Directive

The CSSF has issued Circular 21/778, which amends Circular 11/509 on the notification procedures to be followed by a Luxembourg UCITS wishing to market its shares/units in another EU Member State and by a UCITS from another EU Member State wishing to market its shares/units in Luxembourg.

The update integrates into Circular 11/509 certain practical and technical modifications relating to cross-border marketing of UCITS notification procedures to be followed in accordance with the new requirements of Directive 2019/1160 on the cross-border marketing and distribution of UCITS and AIFs (Cross-Border Distribution of Funds Directive). The circular extends the types of notification procedures to address the de-notification of a Luxembourg UCITS in a host Member State pursuant to the new Article 93a of the UCITS Directive, and in respect of which an initial notification for marketing has been made with the CSSF in accordance with Article 93 of the UCITS Directive.

Such a de-notification procedure will imply the submission of a notification file to the CSSF as home Member State national competent authority of the Luxembourg UCITS, including more specifically a de-notification letter complying with the conditions and format set out in Annex 6 of Circular 11/509 (as amended). Two templates of de-notification letters are available on the CSSF website depending on whether the relevant de-notification concerns a UCITS' sub-fund or a share class. The de-notification letter will confirm compliance by the relevant UCITS with the conditions of Article 93a, as well as whether there are investors in the relevant host Member State affected by the de-notification who are still invested in the UCITS' sub-fund/share class at the time of the de-notification. The letter must be signed by an authorised signatory of the UCITS management company/self-managed UCITS or by a person empowered by a written mandate to act on behalf of the notifying entity.

Luxembourg bill amending Luxembourg law on indices used as benchmarks published

Bill No. 7861, the main purpose of which is to amend the Luxembourg law of 17 April 2018 on indices used as benchmarks (Benchmark Law) in order to reflect three EU regulations amending the Benchmarks Regulation (EU) 2016/1011, has been lodged with the Luxembourg Parliament.

The bill introduces a framework to anticipate the termination of benchmarks, in particular LIBOR by the end of 2021. The new rules are intended to reduce legal uncertainty and avoid risks to financial stability by ensuring that a legal replacement rate can be put in place before the benchmark ceases to exist.

In addition, the bill integrates into Luxembourg law the changes brought about at the EU level by Regulation 2019/2175 granting additional powers to ESMA. ESMA will have direct supervisory powers over certain critical benchmarks and their administrators as of 1 January 2022, and in particular over recognised third-country benchmark administrators.

The bill also amends Article 4 of the Benchmark Law to include two new provisions in the list of provisions that are sanctionable under the Benchmark Law.

The lodging of Bill No. 7861 with the Luxembourg Parliament constitutes the start of the legislative procedure.

Investment firms: Luxembourg law implementing IFD and IFR published

The Luxembourg law of 21 July 2021 implementing Directive (EU) 2019/2934 on the prudential supervision of investment firms (IFD), certain provisions of Directive (EU) 2019/2177, Directive (EU) 2020/1504, Regulation (EU)

2019/2033 on the prudential requirements of investment firms (IFR), as well as Article 4 of Regulation (EU) 2019/2175, has been published in the Luxembourg official journal (Mémorial A).

The law follows the IFD/IFR's objective of establishing a framework for the prudential supervision of investment firms that is more appropriate to the nature of the activities of investment firms, their vulnerabilities and inherent risks. The law introduces four major categories of investment firms into Luxembourg law:

- investment firms in 'class 1' are qualified as credit institutions. These include the biggest investment firms exercising the activities of dealing on own account or underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis and whose total value of assets exceeds EUR 30 billion;
- investment firms in 'class 1b' are investment firms exercising the activities of dealing on own account or underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis, which because of their size or importance or due to the fact that they belong to a group, remain subject to a number of requirements under Directive 2013/36/EU and Regulation (EU) 575/2013, without however being treated as credit institutions. In Luxembourg, these are defined as CRR investment firms;
- investment firms in 'class 2' represent the traditional investment firms and are entirely subject to the new IFD/IFR framework; and
- investment firms in 'class 3' are small and non-interconnected investment firms benefiting from certain derogations in order to ensure the proportionality of the rules applicable to them.

As well as investment firms, the new IFD/IFR regime will also impact UCITS management companies and AIFMs. The law further amends the Luxembourg law of 5 April 1993 on the financial sector to transfer certain authorisation and supervision powers in relation to data reporting service providers from the national competent authority to ESMA. It also modernises the status of certain professionals of the financial sector and facilitates the exchange of information between competent authorities, including with national regulators and the European Supervisory Authorities.

Finally, the law ensures the implementation of the MiFID 'Quick Fix' Directive (Directive (EU) 2021/338 to help the recovery from the COVID-19 crisis) and the Crowdfunding Directive (Directive (EU) 2020/1504).

The law will enter into force on 31 July 2021, subject to certain transitional provisions which foresee the application of certain provisions from 1 January 2021. The Crowdfunding Directive implementing provision will enter into force on 10 November 2021.

Luxembourg law modernising authorisation regime for entities in financial and insurance sector published

The Luxembourg law of 21 July 2021 modernising the authorisation regime for entities in the financial and insurance sector has been published in the Luxembourg official journal (Mémorial A).

The law modernises the authorisation regime in particular by granting the CSSF and the Commissariat aux assurances (CAA) the power directly to grant

and withdraw the authorisation of entities subject to their respective supervision. The authorisation for these entities will therefore no longer be granted by the Minister in charge of the financial and insurance sector (i.e. currently the Minister of Finance).

The law is intended to take into account the evolution of EU law, which increasingly advocates the allocation of authorisation powers to the competent national authorities in charge of prudential supervision and reflects analogous allocation of authorisation powers to the ECB (with regard to Eurozone credit institutions within the scope of the Single Supervisory Mechanism Regulation (EU) No 1024/2013) and ESMA (with regard to EU central counterparties) on the European level.

The law implements the change in approach in a series of Luxembourg sectorial laws relating to the financial sector, including the financial sector law, the CSSF law, the payment services law, the insurance sector law and the markets in financial instruments law.

The law provides for a transitory provision according to which already authorised entities continue to benefit from their existing ministerial authorisation.

The law will enter into force on 30 July 2021.

Luxembourg laws ratifying amendments to SRF and ESM treaties published

Two Luxembourg laws of 21 July 2021, which ratify the amendments made to the agreement on the transfer and mutualisation of contributions to the Single Resolution Fund (SRF) and to the Treaty Establishing the European Stability Mechanism (ESM), signed in Brussels on 27 January 2021 and 8 February 2021, have been published.

The amendments made to the agreement on the transfer and mutualisation of contributions to the SRF are intended to organise the transfer and mutualisation of contributions to the SRF in order to implement the common backstop for the SRF in 2022.

In addition to ratifying the ESM treaty amendments, the ratifying law provides that debt instruments (titres de creance) that are issued by the ESM and are subject to Luxembourg law do not have to be remitted to a third party and can be issued without consideration at the point in time of their issuance. The instruments and the claims they represent validly exist as of their issuance. As long as the ESM itself holds the instruments issued by it, all rights attached to the instruments are suspended. The suspension ends as soon as the instrument is transferred to a third party. The aforementioned issuances and related features foreseen in the law are deemed essential to permit the ESM effectively to assume its new role in the framework of the common backstop mechanism for the SRF.

The two laws will enter into force on 30 July 2021.

Luxembourg law transposing Cross-Border Distribution of Funds Directive and specifying accounting standards for annual reports of Luxembourg SCSp-AIFs published

The law of 21 July 2021 transposing Directive EU/2019/1160 on the cross-border marketing and distribution of UCITS and AIFs within the EU has been published in the Luxembourg official journal (Mémorial A).

The main objective of the new law is to amend the law of 17 December 2010 on undertakings for collective investment (UCI Law) and the law of 12 July 2013 on AIFM (AIFM Law) with a view to implementing into Luxembourg law the provisions of the Directive concerning:

- the pre-marketing of EU AIFs by EU AIFMs in the EU;
- the provision of local facilities for UCITS and AIFs being marketed to retail investors in the EU;
- the de-notification procedure for discontinuing the marketing of UCITS and EU AIFs in a host Member State; and
- the alignment of certain notification and timeframe requirements in case of modifications to the information initially notified for the cross-border marketing of UCITS and EU AIFs in a host Member State.

The new law also amends Article 20(3) of the AIFM Law concerning the annual reports of AIFs to specify that Luxembourg authorised AIFMs which are managing Luxembourg AIFs established under the legal form of a special limited partnership (SCSp) may prepare the accounting information given in the annual reports of these SCSp-AIFs by using either (i) Luxembourg GAAP, (ii) IFRS or (iii) other accounting standards considered as equivalent to IFRS by the EU Commission, including more specifically the US GAAP.

The law of 21 July 2021 entered into force on 2 August 2021, which is the date by which Member States had to transpose the Directive into their national legislation.

CNMV adopts ESMA guidelines on enforcement of financial information

The Spanish Securities Market Commission (CNMV) has adopted ESMA's amended guidelines on enforcement of financial information, published on 23 November 2020. The CNMV will continue to take these guidelines into account in its supervisory and investor protection responsibilities.

CNMV consults on draft technical guide for suitability assessment

The CNMV has launched a public consultation on a draft technical guide intended to updated the criteria, practices, methodologies, and procedures that the CNMV considers appropriate for compliance with applicable regulations in the area of suitability assessments (evaluación de conveniencia), in replacement of the action guide for the analysis of suitability and appropriateness of 17 June 2010. The CNMV intends to approve the technical guide once the new ESMA guidelines in this area are published.

Comments are due by 30 September 2021.

CNMV issues public statement on provision of investment services in Spain by third-country firms without establishment of a branch

The CNMV has issued a public statement on the provision of investment services in Spain by third-country firms, setting out the following cases in which the establishment of a branch is not required for the provision of investment services in Spain:

- where there is reciprocity in the home state and the conditions set out in the second and third bullet point are also met;
- the services are provided to eligible counterparty or professionals clients (as defined under the Spanish Securities Market Law) and, in the latter case, provided that certain threshold are not exceeded; or
- in other exceptional cases and in view of the specific circumstances, the CNMV considers it appropriate to grant the authorisation.

HKMA revises SPM module on remuneration systems

The Hong Kong Monetary Authority (HKMA) has issued a revised version of its supervisory policy manual (SPM) module 'CG-5 Guideline on a Sound Remuneration System'. The changes incorporated in the revised SPM module are mainly intended to:

- update the existing guidelines following the most recent guidance issued by the Financial Stability Board on sound remuneration practices, and in particular on the use of remuneration tools to address potential misconduct risks;
- strengthen Board oversight on the formulation and implementation of remuneration systems and related control processes;
- provide guidance in relation to the adoption of group remuneration policies and approval of remuneration packages of senior management and key personnel for foreign bank branches; and
- update the existing guidelines to align with the remuneration disclosure requirements in the Banking (Disclosure) Rules.

The HKMA expects authorised institutions to review whether their remuneration systems are consistent with the principles set out in the revised module and, if needed, to adopt all necessary changes not later than 1 January 2022.

Order extending application period for Simplified Insolvency Programme gazetted

The Ministry of Law has announced that it will extend the application period for the Simplified Insolvency Programme (SIP) by 12 months, to end on 28 July 2022 instead of the current 28 July 2021.

The SIP was introduced on 29 January 2021 as an amendment to the Insolvency, Restructuring and Dissolution Act to help eligible micro and small companies (MSCs) that face financial difficulties restructure their debts to rehabilitate their business or wind up via simpler, faster and lower cost insolvency processes. The Ministry of Law notes that MSCs that have relied on industry-wide support measures by the Singapore Government and financial industry may face further financial headwinds in the coming months as temporary relief measures taper off.

Given the challenging environment, the Ministry of Law has gazetted the Insolvency, Restructuring and Dissolution (Extension of Prescribed Periods for Parts 5A and 10A) Order 2021 to extend the prescribed period for the purposes of Part 5A and Part 10A of the Insolvency, Restructuring and Dissolution Act 2018 by 12 months starting on the effective date of the Order.

The Insolvency, Restructuring and Dissolution (Extension of Prescribed Periods for Parts 5A and 10A) Order 2021 is effective from 29 July 2021.

SC-STS publishes recommendations for legacy SOR transition

The Steering Committee for Singapore Dollar Swap Offer Rate (SOR) & Singapore Interbank Offered Rate (SIBOR) Transition to Singapore Overnight Rate Average (SORA) (SC-STS) has published a report setting out updated timelines and key recommendations for the industry-wide transition of financial contracts away from the legacy use of SOR.

The following are its key recommendations to facilitate a smooth transition out of SOR contracts:

- wholesale market participants are strongly encouraged substantially to shift out of their legacy SOR exposures by 31 December 2021, using the SOR-SORA basis swap market as a reference for the transition from SOR to SORA;
- borrowers and lenders should refer to the SOR-SORA basis swap mid-rate as a starting point for discussions on conversion;
- issuers of resettable fixed rate securities that reference SOR interest rate swap rates after 31 December 2021 and issuers of floating rate notes that mature after 30 June 2023 should immediately explore options for the remediation of such securities;
- market participants should actively transition out of SOR derivatives by end-December 2021, in tandem with banks' gradual wind-down of their SOR exposures in the months ahead; and
- a simplified transition approach is recommended for the retail loan market, where banks would make available to retail customers a SORA conversion package at no additional fee or lock-in.

The SC-STS has indicated that it will also undertake a public education campaign starting in September 2021 to raise awareness of the industry-wide transition from SOR to SORA.

Australian Government consults on evaluation of 2021 foreign investment reforms

The Australian Government has launched a public consultation on the evaluation of the 2021 foreign investment reforms. The reforms updated Australia's foreign investment review framework in three broad ways: by addressing national security risks; strengthening the existing system, including in relation to compliance; and streamlining investment in non-sensitive businesses.

Section 4 of the Foreign Investment Reform (Protecting Australia's National Security) Act 2020 requires the Australian Treasury to complete an evaluation of the operation of the foreign investment reforms by 10 December 2021. The evaluation is intended to consider the impact that the reforms and their implementation have had on foreign investment in Australia and the broader Australian economy, and whether the right balance is struck between welcoming foreign investment and protecting Australia's national interests.

The Australian Treasury has indicated that, while stakeholders are welcome to comment on any element of the reforms or the foreign investment review framework overall, it is particularly interested in receiving feedback on the key matters that have been outlined in the consultation paper.

Comments on the consultation are due by 31 August 2021.

APRA consults on regulatory support for loans impacted by COVID-19

The Australian Prudential Regulation Authority (APRA) has launched a public consultation on regulatory support, which was announced on 19 July 2021, for authorised deposit-taking institutions (ADIs) offering temporary financial assistance to borrowers impacted by COVID-19.

For eligible borrowers, ADIs will not need to treat a repayment deferral as a loan restructuring or the period of deferral as a period of arrears. The relief is applicable to loans that have been granted a repayment deferral of up to three months on or before 31 August 2021, whether or not the borrower has previously been granted a repayment deferral. APRA intends to formalise the regulatory support through a temporary amendment to Prudential Standard APS 220 Credit Quality (APS 220), in particular by replacing the attachment E to APS 220.

APRA proposes to require ADIs to disclose publicly and report the nature and terms of repayment deferrals and the volume of loans to which they are applied. To enable an understanding of the impact of these loans on the financial system, APRA intends to collect entity-level data by recommencing reporting under Reporting Form ARF 923.2 COVID-19 Repayment Deferrals. For transparency APRA may also decide to publish entity-level data collected under Reporting Standard ARS 923.2 Repayment Deferrals.

Comments on the consultation are due by 6 August 2021.

ASX consults on proposed amendments to ASX Clear (Futures) Operating Rules and Procedures

The Australian Securities Exchange (ASX) has launched a public consultation on proposed amendments to the ASX Clear (Futures) Operating Rules and Procedures. The proposed changes are intended to:

- replace the 2006 ISDA Interest Rate Derivatives Definitions with the new 2021 ISDA Interest Rate Derivatives Definitions as the standard definitions for cleared interest rate swaps from 4 October 2021;
- clarify the existing position that ASX Clear (Futures) (ASX) owns cash and securities provided to it by clearing participants as margin, commitment or excess deposits; and
- provide an express power for ASX Clear (Futures) to re-hypothecate non-cash collateral of a defaulting participant.

ASX has indicated that, subject to consultation feedback and regulatory clearance, it is expected that the amendments to the ASX OTC Rules and Handbook for the 2021 ISDA Definitions will be effective from 4 October 2021 and to the Futures Rules and OTC Rules to clarify the ownership of cash and securities in the fourth quarter of 2021.

Comments on the consultation are due by 25 August 2021.

US federal legislation to facilitate transition from USD LIBOR introduced in House of Representatives

H.R. 4616, Adjustable Interest Rate (LIBOR) Act of 2021, sponsored by Representative Brad Sherman, has been introduced in the US House of

Representatives. The House's Committee on Financial Services, Committee on Ways and Means, and Committee on Education and Labor will next consider the provisions of this bill. Once this bill passes committee review, a House vote to approve the bill may be scheduled. If enacted as currently proposed, this federal legislation would:

- replace USD LIBOR by operation of law for contracts that are governed by US law and do not contain adequate fallback provisions with a benchmark replacement that is based on SOFR and has been selected by the Federal Reserve Board with a spread adjustment;
- include continuity of contract and litigation safe harbor provisions;
- amend Section 316 of the US Trust Indenture Act of 1939 to facilitate the replacement of USD LIBOR pursuant to this legislation; and
- supersede New York's LIBOR legislation, except with respect to contracts that are governed by New York law, do not contain adequate fallback provisions, and reference one-week or two-month tenors of USD LIBOR.

RECENT CLIFFORD CHANCE BRIEFINGS

The UK National and Security Investment Act – mark the date

The UK Government announced on 20 July 2021 that the substantive provisions of the National Security and Investment Act will commence fully on 4 January 2022. The Government's announcement was accompanied by draft secondary legislation defining the sectors that will be subject to mandatory filing, a revised Statement of Policy Intent explaining which transactions are most at risk of scrutiny and various additional guidance for businesses.

This briefing discusses the new Statement of Policy Intent, draft SI and guidance.

https://www.cliffordchance.com/briefings/2021/07/the-uk-national-security-and-investment-act--mark-the-date.html

How Scotland might achieve independence

Scotland may have voted, in 2014, to remain part of the UK, but Brexit and the SNP's persistent political ascendancy mean that the dream, or spectre, of Scottish independence remains alive.

This briefing – the first in a short series – explores some of the legal issues that will arise and how Scotland might achieve independence – a matter probably more of politics than of law.

https://www.cliffordchance.com/briefings/2021/07/how-scotland-might-achieve-independence.html

The effect of independence on Scotland's international status, laws, people and companies

If Scotland were to vote for independence from the rest of the United Kingdom, Scotland would be a new state, though its laws and legal system would continue.

Independence would, however, have a profound effect on people and companies on both sides of the border. Can companies migrate from north of

the border to south, or vice versa? Will people be able to travel and work freely in both countries?

This briefing discusses the effect of Scottish independence. This is the second in our series of briefings looking at Scottish Independence.

https://www.cliffordchance.com/briefings/2021/07/the-effect-of-independence-on-scotland-s-international-status--l.html

UK's Prudential Regime for MIFID Investment Firms – FCA publishes new Remuneration Code

The FCA has published its single remuneration code for investment firms authorised under the MIFID (to be known as 'the MIFIDPRU Remuneration Code').

This briefing discusses the MIFIDPRU Remuneration Code.

https://www.cliffordchance.com/briefings/2021/07/uk-s-prudential-regime-for-mifid-investment-firms--fca-publishes.html

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